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AN IMPERIAL SECURITY COUNCIL? IMPLEMENTING SECURITY COUNCIL RESOLUTIONS 1373 AND 1390

THE SECURITY COUNCIL'S COUNTER-TERRORISM ROLE: CONTINUITY AND INNOVATION

by Jane E. Stromseth*

The UN Security Council has taken important steps against terrorism since the attacks of September 11, 2001. Some of those steps build on previous Security Council counterterrorism efforts; others represent significant innovations. I will focus in particular on Resolution 1373, which the Council adopted on September 28, 2001, and on Resolution 1390, adopted four months later in January 2002.

Resolution 1373 is far-reaching. Adopted under Chapter VII of the UN Charter, it imposes binding obligations on states to prevent and suppress the financing of terrorist acts, to deny safe haven to terrorists, to install effective border controls, to enact domestic counterterrorism legislation, and to bring to justice those who commit terrorist acts, among other requirements.¹ This broad resolution is legislative in nature, imposing obligations on states not in response to a particular conflict but in response to the more global threat to peace and security posed by terrorism. The resolution also established a counterterrorism committee (CTC), which consists of all the members of the Security Council, to monitor implementation of the resolution. The committee has played an enormously important role in beginning the long and critical process of building the antiterrorism capacities of states.

Resolution 1390 is also ambitious. It is the child of an earlier resolution, 1267, that in October 1999 imposed sanctions on the Taliban regime, including a flight ban and an asset freeze, to enforce the Security Council's demand that the Taliban turn over Osama bin Laden and stop providing sanctuary and training to terrorists in Afghanistan. Resolution 1267 had established a sanctions committee—also comprised of all the Security Council members—with a mandate to evaluate information from states regarding compliance with the sanctions imposed on the Taliban, and also to “identify where possible persons or entities” that were violating the sanctions.² After the fall of the Taliban, this sanctions regime was modified: the flight ban against Afghanistan was terminated and in Resolution 1390 the sanctions were expanded: 1390 obligates states to freeze assets, deny entry or transit, and prevent arms transfers to Osama bin Laden, members of al Qaeda, and the Taliban, and other individuals, groups, and entities associated with them wherever they may be located. Moreover, the sanctions committee was tasked with maintaining and updating a list of individuals and entities against whom the sanctions are directed “on the basis of relevant information provided by Member States and regional organizations.”³

I will aim to do three things in my remarks. First, I will give some brief historical context to help situate these resolutions within the larger context of Security Council

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¹ S.C. Res. 1373, paras. 1, 2 (Sept. 28, 2001), *available at* <<http://www.un.org/Docs/scres/2001/sc2001.htm>>.

² S.C. Res. 1267, para. 6(d) (Oct. 15, 1999), *available at* <<http://www.un.org/Docs/scres/1999/sc99.htm>>.

³ S.C. Res. 1390, para. 5(a) (Jan. 16, 2002), *available at* <<http://www.un.org/Docs/scres/2002/sc2002.htm>>.

decisions to create subsidiary organs, most notably sanctions committees, in responding to threats to peace and security. Second, I will examine the extent to which Resolutions 1390 and 1373 represent innovations, with a special focus on the CTC, its achievements to date, and some of the challenges it faces. Third, I will raise broader issues about the Security Council's counterterrorism role.

LEGAL AND HISTORICAL CONTEXT

Under the UN Charter, the Security Council has primary responsibility for maintaining international peace and security; it has broad authority under Article 39 to determine whether threats to the peace exist and under Chapter VII to decide on appropriate responses. The Charter's framers deliberately left the terms in Article 39 undefined to give the Security Council flexibility in responding to new threats to the peace that might emerge. Moreover, under Article 29, the Security Council "may establish such subsidiary organs as it deems necessary for the performance of its functions." While the Council's actions must be consistent with the purposes and principles of the Charter, it nevertheless has considerable flexibility both in its responses to threats to the peace and in the bodies it creates to assist it.

What is striking in looking at the broad history of Security Council action, however, is the intensity of innovation that occurred during the 1990s and beyond. Before 1990, sanctions had been imposed only twice—in 1968 against Southern Rhodesia (now Zimbabwe) and in 1977 against South Africa; the Security Council appointed sanctions committees in both cases.⁴ Since 1990, however, sanctions have been imposed and sanctions committees set up at least a dozen times. In each case the committee included all the Security Council members and operated by consensus.

Beyond the proliferation of sanctions committees, the Security Council during the 1990s used its Chapter VII authority to establish innovative regimes in response to particular threats to peace and security. After the 1991 Gulf War, for example, in addition to the Iraq Sanctions Committee the Council established not only the UN Special Commission (UNSCOM) and later the UN Monitoring, Verification and Inspection Commission (UNMOVIC), giving them disarmament and verification responsibilities, but also the Compensation and Boundary Demarcation Commissions.⁵ More innovation took place in 1993 and 1994 when the Council used its Chapter VII authority to establish the International Criminal Tribunals for the Former Yugoslavia and for Rwanda in response to the threats to the peace it identified in those conflicts.⁶

RESOLUTIONS 1267/1390 AND RESOLUTION 1373

Do the Security Council's main counterterrorism resolutions, 1267 and its progeny, and 1373, represent innovations beyond these notable developments of the 1990s? To a substantial degree, Resolution 1267 follows in the footsteps of previous sanctions regimes. Earlier sanctions committees were given authority to monitor compliance and in some cases to name particular individuals and entities against whom sanctions should be applied. One example is Resolution 1132 of 1997 concerning Sierra Leone.⁷ But the scope of the 1267/1390 sanctions committee's authority to name names seems

⁴ 1 CHARTER OF THE UNITED NATIONS: A COMMENTARY 548 (Bruno Simma et al. eds., 2d ed. 2002).

⁵ *Id.* at 550–52.

⁶ *See id.* at 556–62.

⁷ *See* S.C. Res. 1132, para. 10(f) (Oct. 8, 1997), available at <<http://www.un.org/Docs/scres/1997/scres97.htm>>.

broader than under previous regimes, in part because the sanctions themselves are now of potentially global reach. The sanctions apply to Osama bin Laden, members of al Qaeda and the Taliban, and individuals and entities associated with them, wherever they may be located. The focus is not on a particular state or conflict situation but on a worldwide terrorist organization. The most recent resolution in this process—Resolution 1455 adopted in January 2003—reinforces the monitoring of state compliance by asking the sanctions committee to consider visits to specified countries and to provide detailed oral reports to the Security Council on member state implementation of the sanctions.⁸

Although Resolution 1373 does not have the enforcement mechanisms of Resolution 1267 and its progeny, in many ways it represents a greater innovation. Adopted under Chapter VII, Resolution 1373 imposes binding obligations on states in the context of responding not to a particular country or conflict situation but to the more global threat to peace and security represented by terrorism. As the late Paul Szasz thoughtfully argued, the Security Council “broke new ground” by using its Chapter VII powers for the first time “to order all states to take or to refrain from specified actions in a context not limited to disciplining a particular country.”⁹ Drawing upon a number of legal instruments, including the International Convention for the Suppression of the Financing of Terrorism adopted by the General Assembly in 1999, the Security Council imposed binding and far-reaching counterterrorism obligations upon states.¹⁰

Just as significant is the way Resolution 1373 is being implemented. The Security Council said very little in Resolution 1373 about the role of the CTC it established, other than tasking the committee “to monitor implementation of this resolution, with the assistance of appropriate expertise,” and calling upon states to report to the committee on the steps they were taking to implement their obligations.¹¹ Under the leadership of its first chair, Britain’s UN Ambassador Jeremy Greenstock, however, the CTC has become a centerpiece of global counterterrorism capacity-building efforts. Ambassador Greenstock—operating by consensus and emphasizing transparency and dialogue—has directed the CTC toward building the capacity of states to comply with Resolution 1373, recognizing that states have differing abilities to meet the obligations the Security Council has imposed on all members.¹²

Ambassador Greenstock has emphasized that the CTC is designed not to single out and judge individual states but rather to work cooperatively with states to help them meet their 1373 obligations.¹³ In addition to reviewing the reports submitted by states and seeking additional reports and clarification as needed (and they often are), the CTC has divided its efforts to assess and strengthen state counterterrorism capacity into three stages. In the first, states should have in place legislation that addresses all the areas covered in Resolution 1373 and should develop a process to become party to the twelve international counterterrorism conventions and protocols. Moreover, states

⁸ S.C. Res. 1455, paras. 11, 14 (Jan. 17, 2003), available at <http://www.un.org/Docs/sc/unsc_resolutions03.htm>.

⁹ Paul C. Szasz, *The Security Council Starts Legislating*, 96 AJIL 901 (2002).

¹⁰ See International Convention for the Suppression of the Financing of Terrorism, opened for signature Jan. 10, 2000, G.A. Res. 54/109 (Dec. 9, 1999), 39 ILM 270 (2000).

¹¹ S.C. Res. 1373, *supra* note 1, para. 6.

¹² For two very helpful discussions of the CTC’s work, see Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AJIL 333 (2003), and Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism Since September 11th*, 35 CORNELL INT’L L.J. 475, 482–86 (2002).

¹³ See, e.g., Press Release, United Nations Security Council, Security Council Considers Terrorists Threats to International Peace, Security—Statement by Chairman of Counter-Terrorism Committee (Oct. 4, 2002), available at <<http://www.un.org/News/Press/docs/2002/sc7522.doc.htm>> [hereinafter Remarks of Jeremy Greenstock].

should establish “effective executive machinery” to suppress and prevent the financing of terrorism.¹⁴ The second phase goes a step further; it will review whether states have effective and coordinated executive mechanisms to implement all areas of Resolution 1373, including police and intelligence structures and customs, immigration, and border controls.¹⁵ Eventually, the CTC expects to move to a third stage, which will focus on state action to bring terrorists and their supporters to justice and on bilateral, regional, and international cooperation, including information-sharing and judicial cooperation.¹⁶

The CTC has already had important achievements: By January 2003 all but thirteen of the 191 UN member states had reported on the steps they were taking to implement Resolution 1373; many states are adopting or considering new counterterrorism legislation, and twenty-four states had ratified all twelve of the counterterrorism conventions (up from only two states before September 11, 2001).¹⁷ The CTC has also worked to build links with regional and other international organizations to coordinate and reinforce counterterrorism efforts and has established a Directory of Counterterrorism Information and Sources of Assistance, with a Web site that aims to match donors, resources, and skills, including assistance in drafting legislation, with states that need to build capacity in certain areas.¹⁸ It is not an exaggeration to say that the CTC is at the center of global counterterrorism capacity-building.

But while the consensual, nonconfrontational approach of the CTC has worked well so far, challenges lie ahead; let me mention just three of the most significant. First is the challenge of ensuring that capacity “on the books”—in legislation and executive flowcharts—equals real capacity on the ground. Building state capacity requires resources, and the CTC itself does not have funds to dispense for this purpose, although it is working to identify and help match potential donors and recipients.

Furthermore, to assess whether states—as Resolution 1373 requires—are ensuring “that any person who participates in the financing, planning, preparation or perpetration of terrorist acts . . . is brought to justice” depends on what is actually happening on the ground.¹⁹ The CTC may well need to undertake field assessment missions to monitor effective implementation of 1373.²⁰

Second, and related to the first point, Resolution 1373 requires states to take strong action against those who finance or engage in terrorist acts, but it does not define terrorist acts or terrorism. To be sure, it calls upon states to ratify the twelve international counterterrorism conventions and protocols, which themselves prohibit certain terrorist acts. (The International Convention for the Suppression of the Financing of Terrorism prohibits the funding of acts prohibited by international counterterrorism conventions as well as other specified acts.²¹) But by not defining terrorism or terrorist acts, Resolution 1373 effectively allows member states to define terrorism in their domestic legislation. Much can still be accomplished using as building blocks the definitions

¹⁴ *Id.*; see also Rosand, *supra* note 12.

¹⁵ See Guidance Note (on the preparation of a summary of counterterrorism activities), CTC Special Meeting (March 6, 2003), available at <<http://www.un.org/Docs/sc/committees/1373>>.

¹⁶ *Id.*

¹⁷ See Remarks of Jeremy Greenstock, *supra* note 13, at 6.

¹⁸ The directory, including a Matrix of Assistance, can be found at <<http://www.un.org/sc/ctc>>

¹⁹ S.C. Res. 1373, *supra* note 1, para. 2(e).

²⁰ For discussion of some potential challenges here, see Rosand, *supra* note 12.

²¹ Article 2(b) of the Convention, *supra* note 10, at 271, for example, prohibits the funding of acts “intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”

contained in various counterterrorism conventions, but the CTC's ability to go beyond capacity building and to monitor whether states are in fact complying with their obligations to bring "to justice" and "deny safe haven" to those who commit "terrorist acts" will eventually confront the CTC with some of the same difficulties that the General Assembly's Sixth (Legal) Committee has confronted in its struggle to reach agreement on a comprehensive convention on international terrorism.

Third is the challenge of protecting human rights while combating terrorism. The Office of the UN High Commissioner for Human Rights has provided proposals, which can be found on the CTC Web site,²² for further guidance on human rights principles that should be taken into account as states adopt measures and file reports under Resolution 1373.²³ Though it has indicated its willingness to work with other organizations, the CTC has also emphasized that other bodies are mandated to monitor compliance with human rights obligations.²⁴ Still, in developing its matrix of assistance and trying to match donors of expertise and funds with recipient states, the CTC could help build the capacity of states to safeguard human rights while strengthening counterterrorism legislation. Working out the appropriate relationship between the CTC and other human rights bodies will be an important continuing issue.

THE EMERGING SECURITY COUNCIL ROLE

What does the Security Council's recent experience with Resolutions 1373 and 1390 suggest about its future counterterrorism role? Let me emphasize two points: First, the Security Council will face challenges in sustaining both consensus and momentum in its counterterrorism efforts. Sustaining the unity present in the Council immediately after the September 11 attacks has been difficult; the later phases of implementing a resolution as ambitious as 1373 inevitably will raise more difficult issues than the earlier phases. Moreover, depending on how those later phases progress, the Council may need to consider what steps to take if states fail to comply with their 1373 obligations. The Council will also need to consider whether and how the CTC and the sanctions committee established by Resolution 1267 could work together. Resolution 1455 represents a beginning of such consideration; it may be that the detailed oral assessments of member state implementation of 1267 that it calls for—and possible on-site visits—could eventually include analysis of 1373 compliance as well.

Second, despite difficult challenges ahead, the UN Security Council has an indispensable role to play in articulating and reinforcing international standards against terrorism; in requiring states to take effective counterterrorism measures; in coordinating and marshalling the assistance of regional organizations, other international organizations, and nongovernmental organizations in building and reinforcing counterterrorism capacities; and in authorizing sanctions and other enforcement action as needed. Despite political differences and current difficulties, the last decade suggests that the Security Council will continue to find ways to innovate in response to threats to peace and security in the dangerous years ahead.

²² See <<http://www.un.org/Docs/sc/committees/1373>>.

²³ See UN High Commissioner for Human Rights, Proposals for "Further Guidance" for the Submission of Reports Pursuant to Paragraph 6 of Security Council Resolution 1373 (2001), available at <<http://www.un.org/Docs/sc/committees/1373/ohchr2.htm>>; UN High Commissioner for Human Rights, Note to the Chair of the Counterterrorism Committee: A Human Rights Perspective on Counter-Terrorist Measures (Sept. 23, 2002), available at <<http://www.un.org/Docs/sc/committees/1373/ohchr1.htm>>.

²⁴ See Jeremy Greenstock, Address at the Symposium on Combating International Terrorism: The Contribution of the United Nations (June 3–4, 2002), at 3–4, available at <<http://www.un.org/Docs/sc/committees/1373/ViennaNotes.htm>>.

**THE USE OF TARGETED SANCTIONS IN THE FIGHT AGAINST
INTERNATIONAL TERRORISM—WHAT ABOUT HUMAN RIGHTS?**

*by Elin Miller**

INTRODUCTION

While it understands the security requirements relating to the events of 11 September 2001, and takes note of the appeal of Sweden for respect for human rights within the framework of the international campaign against terrorism, the Committee expresses its concern regarding the effect of this campaign on the situation of human rights in Sweden.¹

In March 2002, the United Nations Human Rights Committee expressed concern about the legal situation of three Swedish citizens of Somali origin. Swedish financial institutions had frozen all their assets for an unlimited time, honoring the decision of another UN body, a sanctions committee operating under the UN Security Council.

After World War II, many believed that only a supranational United Nations that did not have to answer to national governments could guarantee world peace. They also believed, after the dismantling of the Nazi regime of Germany, in safeguarding individual rights and freedoms. These two concerns, security interests and human rights, present a potential tension in international law that is embodied in the UN Charter. The tension has materialized into a conflict in the Security Council's use of targeted sanctions against individuals in the fight against international terrorism.

Using the case of the three Swedes as an example, this paper points at the current problems and the reasons why they must be addressed. The concrete solutions suggested within the Stockholm process on targeted sanctions² and in a separate study carried out in relation to that process³ will not be repeated here. The point is that the Council can act swiftly and strongly in the fight against international terrorism without violating human rights, and it has the responsibility to do so.

SECURITY COUNCIL RESOLUTION 1333 AND SANCTIONS COMMITTEE 1267

Legal Background

The Council's sanctions against Afghanistan, the Taliban, and al Qaeda is an example of its ability to apply far-reaching enforcement measures in the fight against international terrorism. The sanctions against the Taliban imposed by Security Council Resolution 1267⁴ in October 1999 were extended by Resolution 1333⁵ of December 2000 to include individuals, groups and entities associated with Osama bin Laden or al Qaeda—embracing individuals without any necessary link to a territory or regime. The resolutions order states to implement primarily economic sanctions against those

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¹ Concluding Observations: Sweden, UN Human Rights Committee, para. 12, UN Doc. CCPR/CO/74/SWE (Apr. 24, 2002), available at <<http://www.hri.ca/fortherecord2002/documentation/tbodies/ccpr-co-74-swe.htm>>.

² See MAKING TARGETED SANCTIONS EFFECTIVE, GUIDELINES FOR THE IMPLEMENTATION OF UN POLICY OPTIONS (Peter Wallensteen et al. eds., 2003), available at <<http://www.smartsanctions.se/Reports.htm>>. The Stockholm Process on the Implementation of Targeted Sanctions, a joint diplomatic-academic conference, was organized by the Swedish Foreign Ministry and continued the efforts of the Interlaken and Bonn-Berlin processes.

³ See IAN CAMERON, REPORT TO THE SWEDISH FOREIGN OFFICE ON LEGAL SAFEGUARDS AND TARGETED SANCTIONS, available at <<http://www.jur.uu.se/sii/pfd/sanctions.pdf>> (last visited May 16, 2003).

⁴ SC Res. 1267 (Oct. 15, 1999), available at <<http://www.un.org/Docs/scres/1999/sc99.htm>>.

⁵ SC Res. 1333 (Dec. 19, 2000), available at <<http://www.un.org/Docs/scres/2000/sc2000.htm>>.

individuals (named on an attached list)⁶ believed to have contributed, directly or indirectly, to the financing of terrorism. Resolutions 1390⁷ (January 2002), 1452⁸ (December 2002), and 1455⁹ (January 2003) reinforce and modify these sanctions and extend their application without a time limit.

The imperial flavor of these resolutions, ordering states to take measures against their own nationals or residents without further explanation, raises the issue of how much power the Security Council has to take supranational decisions. Having established a threat to or breach of international peace and security under Article 39, the Security Council may under Article 41 take nonforcible measures, such as economic sanctions, or under Article 42 use armed force. Under Articles 25 and 48, UN member states are obliged to implement those measures.

When qualifying a situation as a threat against or breach of the peace, the Council is in practice limited only by its own credibility. However, the Charter does limit the Council's choice of measures by requiring that it act in accordance with the purposes and principles of the United Nations. Thus, when enacting sanctions targeted against individuals in the name of international peace and security, the Council must not neglect to promote and encourage respect for human rights.

The 1267 Committee

The 1267 Sanctions Committee, a subsidiary of the Security Council, was established by the Council in Resolution 1267 to facilitate and monitor implementation of sanctions in this and later resolutions.

The committee, like any other Security Council sanctions committee, is comprised of all current Council members. It acts by guidelines it writes and adopts itself. Inter alia, it administers the list of targeted individuals.¹⁰ Upon the suggestion of member states, it may add or remove names from the list through a procedure whereby a committee member state must object to a proposed change within forty-eight hours or the change goes into effect. It may also make exceptions on humanitarian or other grounds.

Until recently, new listing proposals contained a minimum of personal information, and, beyond the wording of Resolution 1333, lacked explanations of their basis. The committee has thus accepted proposals without the possibility of substantially evaluating them, or later reviewing these decisions on the merits. The lack of information is partly explained by the need to protect secret intelligence material and sources, which usually provide the names; from that aspect, a system built on political trust has its advantages. From an individual rights and due process perspective, however, it is far from satisfactory. Resolution 1390 has improved the situation somewhat, as has issuance of new guidelines (see below).

The European Union/Swedish Implementation

Resolution 1333 was implemented in the European Union through the adoption of common positions within its common foreign and security policy and through a European Council regulation,¹¹ to which a list of the designated individuals was added.

⁶ The list also contains entities but their aspects are not covered by this paper.

⁷ SC Res. 1390 (Jan. 16, 2002), available at <www.un.org/Docs/scres/2002/sc2002.htm>.

⁸ SC Res. 1452 (Dec. 20, 2002), available at <<http://www.un.org/Docs/scres/2002/sx2002.htm>>.

⁹ SC Res. 1455 (Jan. 17, 2003), available at <<http://www.un.org/Docs/scres/2003/sc2003.htm>>.

¹⁰ A new, consolidated version of the list issued on February 24, 2003 is published at <<http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>>.

¹¹ See European Council Reg. 467/2001 (Mar. 6, 2001), replaced by European Council Reg. 881/2002 (May 27, 2002), available at <<http://www.eurunion.org/partner/EUUSTerror/EUandAfghanistan.htm>>.

The regulation has since been updated to incorporate changes in the UN list. EU regulations apply directly in the member states and take precedence over national law.¹²

Three Swedish citizens associated with the international financial network Al-Barakaat were added to the UN list on November 9, 2001, and to the EU list on November 12, 2001.¹³ Swedish financial institutions immediately implemented the regulation by freezing their bank accounts.

The measures created an outcry in public opinion and received massive attention in national media. Irrespective of the guilt or innocence of the designated persons, there was a general feeling that the three had been in effect convicted of a crime without due process and that injustice had been done.¹⁴ The sanctions regime was perceived as opaque and, because of its lack of an appeals or review mechanism, as violating human rights. Indeed, the very credibility of the United Nations was questioned.

The Swedish government forwarded a request from the designated individuals to the committee to be taken off the list. This did not succeed because the three Swedes failed to present material proving their designation was erroneous. They argued in response that, not having been informed of what their "crime" was, they could not possibly provide counterevidence. After passing Resolution 1390, which mandated that the committee update the list on the basis of relevant information,¹⁵ the Swedish government asked that the committee review the list in its entirety. After the committee turned down this request, Sweden asked for a substantial review of the three particular cases, again without success. The Swedish government also engaged in a dialogue with the state that had put forward the names to the committee, the United States.

The Search for Legal Safeguards

Parallel to this process, Sweden became involved in a general discussion both with the Sanctions Committee and within the European Union on how to improve the UN sanctions regime from an individual rights and due process perspective. The Swedish government proposed that relevant information accompany any proposal to the committee so that the committee could make its own evaluation of facts, and that a review mechanism be provided for. Sweden argued that it was unsatisfying that the committee acted merely as a rubber stamp; it must be responsible for its own decisions.

The lack of an appeal or review mechanism, coupled with the immunity of the United Nations in national courts, leaves a targeted individual with no recourse against sanctions. The Swedish "defendants," however, challenged the EU implementing decisions by filing a complaint with the European Court of Justice (ECJ).¹⁶ An additional concern was thus that the ECJ would find that the EU decision to add the individuals to its list lacked a reasonable basis. That would imply the same for the United Nations, and at a minimum cast a shadow over the world organization.

¹² For a discussion of the validity of European Union implementation of the sanctions regime, see Torbjörn Andersson et al., *EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale*, 14 EUR. BUS. L. REV. 111-41 (2003).

¹³ European Commission Reg. 2199/2001 (Nov. 12, 2001), available at <<http://www.eurunion.org/partner/EUUSTerror/EUandAfganistan.htm>>.

¹⁴ Resolution 1333 does not require that a listed person have committed a crime and he may not be aware that his action may have contributed to financing terrorism. Further, a measure under Article 41 is not necessarily a sanction in its traditional meaning, i.e., deployed against a lawbreaker, but may be applied when it is considered conducive to maintaining international peace and justice. It then has an administrative, preventive character.

¹⁵ In Resolution 1390, the Security Council requested that the 1267 Committee "update regularly. . . on the basis of relevant information provided by Member States and regional organizations" and "promulgate such guidelines and criteria as may be necessary to facilitate the implementation of the measures." SC Res. 1390 (Jan. 28, 2002), para. 5(a), (d), available from <<http://www.un.org/Docs/scres/2002/sc202.htm>>.

¹⁶ Case T-306/01, *Abdirisak Aden v. Commission* (Dec. 10, 2002), available from <<http://europa.eu.int>>.

In implementing Resolution 1373, the European Union adopted certain criteria for listing and provided for regular reviews envisaging delisting, a model that has been referred to as an example for the United Nations.¹⁷ Listing criteria and other possible control mechanisms *ex ante* are pertinent to minimizing the risk of mistaken identifications and also to enabling judicial review of the committee's decisions.

Mistakes can still be made, however, and an appeals or review mechanism is necessary from a due process and human rights perspective.¹⁸ Like the EU model, this must entail ensuring "that there are grounds for keeping them on the list,"¹⁹ which in turn requires that the Sanctions Committee have access to enough information to make this assessment. Apart from regular reviews on the committee's own motion, the regime should allow for a right to contest a listing. Given the possibility that a state might refuse to act to protect a national or resident, this must include an individual right to file a complaint.

The problems of disclosing secret intelligence material should not be underestimated, but declassifying certain parts of "incriminating" material may be sufficient. Also, national courts have ways to handle such material that can surely be used as a model even in a political context.²⁰

Progress

As a result of the efforts by Sweden and others, the Security Council in Resolution 1390 asked the committee to issue new guidelines.²¹ After a difficult, almost year-long process, these were finally adopted in November 2002.²² One improvement is that the committee will now update the list "when new information is received."²³ Another is that proposed additions shall include "to the extent possible, a narrative description of the information that forms the basis or justification for taking action" and "to the extent possible, relevant and specific information to facilitate their identification by competent authorities."²⁴ Although improving the sanctions regime, regrettably the

¹⁷ See European Council Common Position on Combating Terrorism, 2001/930/CFSP (Dec. 27, 2001); European Council Common Position on the Application of Specific Measures to Combat Terrorism, 2001/931/CFSP (Dec. 27, 2002); European Council Reg. 2580/2001 (Dec. 12, 2001). Relevant provisions state that the list

shall be drawn up on the basis of precise information or material . . . which indicates that a decision has been taken by a competent authority . . . whether it concerns the instigation of investigations or prosecution . . . or condemnation. . . . '[C]ompetent authority' shall mean a judicial authority, or . . . an equivalent competent authority in that area. . . . The Council shall work to ensure that names . . . have sufficient particulars appended to permit effective identification . . . , thus facilitating the exculpation of those bearing the same or similar names. . . . [T]he names . . . and entities on the list . . . shall be reviewed at regular intervals . . . to ensure that there are grounds for keeping them on the list.

EC Common Position, 2001/931/CFSP, paras. 4–6 ((Dec. 27, 2001), *available at* <<http://www.deltur.cec.eu.int/english/SpecificMeasuresCombTerrorism.pdf>>).

¹⁸ It has been suggested that the time limit of the no-objection procedure, 48 hours, be extended to give members of the committee more time to make independent assessments of names put forward. However, the more time between when the listings become known and when the measures are enforced, the more likely it is that accounts are found empty. A well-designed review mechanism would provide a legal safeguard without rendering the sanctions regime less efficient.

¹⁹ *Supra* note 17, para. 6.

²⁰ Cameron has suggested that a review mechanism consist of an arbitral body where the judges appointed enjoy the trust of both the listed individual and the proposing state. See Cameron, *supra* note 3, at 47.

²¹ See SC Res. 1390, *supra* note 10.

²² See Guidelines of the Committee for the Conduct of its Work, UN Security Council Committee Established Pursuant to Resolution 1267 (1999) (Nov. 7, 2002), *available at* <http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf>.

²³ *Id.*, para. 5(a).

²⁴ *Id.*, para. 5(a)–(c).

criteria are more of an encouraging than obliging nature; it is doubtful whether “a narrative description” will be a sufficient basis for the committee to take a responsible decision.

The new guidelines do describe a process for delisting. An individual must petition the government of residence or citizenship to request review, and the latter must turn to the designating government for additional information and consultation. The petitioned government must then “seek to persuade the designating government(s) to submit jointly or separately a request for de-listing.” The petitioned government may, if this fails, go ahead with a request for delisting on its own, using the no-objection procedure.²⁵

The process for delisting is thus for all practical purposes bilateral rather than providing for review by the committee or another independent body. It still leaves a black-listed person dependent on his government to act on his behalf.

Security Council Resolution 1452, however, greatly improved the regime, providing for humanitarian exceptions to the sanctions. Previously, any exemption had to be approved by the committee; now, member states are free to make exceptions, releasing assets for basic expenses, including for legal services, after the committee has been notified and absent a negative decision within forty-eight hours.

Two of the three Swedes listed were removed from the UN (and therefore also the EU) list in August 2002, but the delisting did not stem from an independent review by the committee. It was the result of a bilateral process, with the individuals presenting exculpatory material to U.S. authorities and disassociating themselves from Al-Barakaat. Discussions are pending on the status of the third individual.

Human Rights Obligations and the UN Charter

Human rights considerations restrict not only the Security Council but also member states through treaty and national law obligations.²⁶ The present regime under Sanctions Committee 1267 does not recognize these obligations.

Article 103 of the Charter requires member states to carry out Chapter VII decisions even if that would violate other international obligations, but it is questionable whether Article 103 could be construed to authorize or require states to violate their obligations under human rights treaties. For one thing, Charter provisions on the organization’s responsibility in the area of human rights, in particular Articles 55 and 56, also address individual member states.²⁷ Moreover, the efforts by member states that produced such instruments as the Declaration of Human Rights in 1948 and the two covenants adopted in 1966, as well as various regional human rights conventions, stemmed from the UN Charter. Finally, the UN has been promoting human rights for over half a century—it would seem more than legalistic to assume that Article 103 can absolve the organization or its member states of their human rights obligations.

Because Resolution 1333 had been implemented by an EU regulation, the issue of human rights obligations, Article 103, or the authority of the Security Council in passing the resolution was never put to a test in the Swedish case. The consequence, according to some critics, was that the resolution overrode provisions in the International Covenant of Civil and Political Rights and the European Convention of Human Rights (ECHR) as well as national constitutional rights, most notably the right to property and

²⁵ *Id.*, para. 7(a)–(d). If the designating state is a member of the committee, the chances of success must be considered slim.

²⁶ One could also argue that the members of the Security Council and the 1267 Committee are bound individually, in their national capacities, to abide by their human rights commitments.

²⁷ Although these provisions do not state an express legal obligation to honor human rights, they impose at least a moral duty on states to do their best in good faith to respect and promote human rights.

the right of access to court or judicial review.²⁸ Now that several cases, including the Swedish, are pending before it, it can be envisaged that the European Court of Justice will look into these arguments very carefully.

A Security Council decision under Chapter VII of the Charter implies a situation where derogation from human rights may be justified. Any derogation must, nonetheless, be proportional, especially given the lack of a time limit on the sanctions. With regard to property rights, the measure may very well be conceived as proportionate since Resolution 1452 was passed. With regard to guaranteeing the right of access to court, however, ECHR case law shows that a state party to the Convention may be absolved from its responsibility only if reasonable alternative means are available to protect this right effectively.²⁹

CONCLUSION

Despite the improvements rendered by Resolutions 1390 and 1452 and the new committee guidelines, the sanctions regime still raises human rights concerns, primarily the right to appeal a listing.

Because the supranational character of the Security Council is paramount in the fight against international terrorism, the Council must not risk its legitimacy and authority,³⁰ as well as the effective cooperation of UN member states, by neglecting human rights obligations. The Council must instead assume its responsibility to avoid creating conflicts among different Charter objectives. International peace and security must be maintained with due respect for human rights.

LAW AND POLICY: SECURITY COUNCIL'S ABILITY TO INNOVATE

*by Danilo Türk**

INTRODUCTION

Resolutions 1373 and 1390 were adopted under Chapter VII of the United Nations Charter. Therefore, they not only are binding by virtue of Article 25 of the Charter but that article also provides a basis for enforcement. If we are to fully understand their political and legal significance, the resolutions must be interpreted in the context of the Security Council's innovation in the field of counterterrorism and more broadly in the context of the Council's general ability to innovate.

I shall use the specific case of Libya to address the innovation, the issue of counterterrorism, and the broader issue of how the Security Council deals with threats to peace.

TRIBUNALS AND SANCTIONS

The past decade has brought important innovation into the practice of the Security Council, the United Nations, and the international community generally. Two major

²⁸ For a thorough analysis of human rights obligations in the Swedish case, see Cameron, *supra* note 3.

²⁹ *See id.* at 32.

³⁰ There was general agreement early in the life of the United Nations that effective protection of human rights through or under the auspices of the United Nations would strengthen the authority of the organization; see 1 OPPENHEIM'S INTERNATIONAL LAW 991 (Roberts Jennings & Arthur Watts eds., 9th ed. 1996).

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areas of innovation are, first, international criminal tribunals and, second, sanctions that do not involve the use of military force. Both are based on Chapter VII of the Charter, specifically Articles 39 and 41.

A traditional pre-1990s interpretation of the UN Charter would most probably exclude any thought that the Security Council might have the power to establish international criminal tribunals. The *eiusdem generis* doctrine (*inclusio unius est exclusio alterius*) leads to the conclusion that the wording of Article 41 excludes sanctions other than the types referred to in the text (complete or partial interruption of economic relations and severance of various types of communication). However, the pressures resulting from genocide and ethnic cleansing and the special political climate of the post-Cold War era gave rise to a much broader interpretation that allowed for creation of the International Criminal Tribunals on the Former Yugoslavia and on Rwanda. In its resolutions creating the tribunals, the Security Council avoided any reference to Article 41, basing its decisions on Chapter VII generally. This “creative ambiguity” helped broaden the scope of the initiatives. More important, the jurists who make up the tribunals gave them credibility; they are by now generally accepted as part of the UN system.

In the area of sanctions, the factor of innovation was no less important. Sanctions regimes have proliferated both in number and variety; over the years their targeting and implementation have improved. An important example of the Security Council’s use of sanctions to make its decisions to combat terrorism more effective started in 1992. In Resolutions 731 and 748, the Security Council demanded that Libya comply with requests from the United States and the United Kingdom to transfer the suspects (Libyan citizens) deemed responsible for the destruction of Pan Am flight 103 over Lockerbie, Scotland, and UTA flight 772 over Niger to the requesting authorities for investigation and trial.¹ To enforce the demand, the Council imposed a flight and arms embargo on Libya. This was a far-reaching innovation. Not only did it enter the sovereign realm of a state by demanding extradition of the state’s own nationals, discarding the option of an investigation and trial by the sovereign authority of the country of citizenship, but it also imposed sanctions to obtain a specific legal effect. This approach—combining a clear demand and targeted sanctions—succeeded.

COUNTERTERRORISM AND SECURITY COUNCIL ENFORCEMENT

The case of Libya has been highly visible, but there were other important, though less noticeable, stages in the evolution of the Security Council’s approach to the issue of terrorism. On January 31, 1992, at the first-ever meeting of the heads of state, the Security Council expressed “deep concern over acts of international terrorism and emphasize[d] the need for the international community to deal effectively with such acts.”² In October 1999 the Security Council adopted Resolution 1269, which in effect placed terrorism among the threats to international peace and security.³ This important conceptual step was taken after the attacks by al Qaeda in Kenya and Tanzania in 1998, the bombing in Moscow in September 1999, and the imposition of sanctions against the Taliban regime in Afghanistan earlier in October 1999. It signaled that the Security

¹ SC Res. 731 (Jan. 21, 1992), available at <<http://www.un.org/Docs/scres/1992/sc92.htm>>; SC Res. 748 (Mar. 31, 1992), available at <<http://www.un.org/Docs/scres/1992/sc92.htm>>.

² Note by the president of the Security Council, UN Security Council, S/23500 (Jan. 31, 1992), available at <<http://projects.sipri.se/cbw/docs/cbw-unsc23500.html>>.

³ SC Res. 1269 (Oct. 19, 1999), available at <www.un.org/Docs/scres/1999/sc99.htm>>.

Council would be prepared to take broader enforcement actions against the perpetrators of terrorism. This was confirmed two years later—after September 11—when the Security Council reaffirmed the right to self-defense (Resolution 1368) against those responsible for the September 11 attacks and adopted, in Resolution 1373, a comprehensive set of obligations requiring serious legislative and executive action by member states.⁴

Resolution 1373 did not emerge as a result of a single event only. It is part of a decade-long evolution. While the events of September 11 were beyond comparison with any previous terrorist attack, it is important to recognize that the Council was already aware of threat terrorism posed to peace and was prepared for innovation in this area.

Security Council Resolution 1373 (2001) requested member states to criminalize terrorist acts and the support and financing of such acts, to deny safe haven to terrorists, and to cooperate with other states to ensure effective counterterrorism action.

None of these obligations is entirely new. The main innovation was the mechanism for implementation. The Counterterrorism Committee established by Resolution 1373 created a tight web of communication between member states and the Security Council and provided a platform for the necessary intense cooperation among states. Not all such cooperation needs to be multilateral or legally defined. Much of it will remain bilateral or among smaller groups of states, and much of it will continue to be very discreet and informal.

The Counterterrorism Committee, for its part, will give overall direction and answers to questions requiring coherent action at the global level. Obviously, this cooperation might result in a need for a firmer institutional structure. Should such a need be identified, the Security Council will already have had the experience needed to establish a permanent institution.

In the meantime, however, it is necessary to craft a sophisticated and effective strategy. New terrorist groups work as diffused networks, organized in dispersed cells; sometimes they do and sometimes they do not depend on a state for support. They can resemble organized crime networks and indeed often engage in illicit trafficking. For UN counterterrorism strategy to succeed it will be vital to elucidate the links between terrorist groups, organized crime, and other illicit traffickers in weapons, drugs, and other commodities. More effective cooperation among international bodies dealing with aspects of these problems is needed. In the United Nations, there must be tighter cooperation between different sanctions committees and other relevant bodies. One of the most notorious traffickers of our time, Victor Bout, was mentioned in reports by three different UN bodies investigating violations of Security Council resolutions, those dealing with Angola, Liberia, and Sierra Leone. He was also reported to have provided an aircraft to Osama bin Laden. Nevertheless, it took years before he was arrested in Belgium. More effective international cooperation is clearly needed.

The Broader Need for Innovation: Threats to Peace

There may be a need for even further action in some areas, however. With regard to weapons of mass destruction, it is necessary to stop the erosion of the authority of nonproliferation regimes. It is also necessary to make special arrangements to deal with the most dangerous cases. Here the United Nations might face one of its most critical tests of the new century. The possibility that weapons of mass destruction may come into the possession of terrorist groups is real. At the same time it is clear that effective

⁴ See SC Res. 1368 (Sept. 12, 2001), available at <<http://www.un.org/Docs/scres/2001/sc2001.htm>>; SC Res. 1373 (Sept. 28, 2001), available at <<http://www.un.org/Docs/scres/2001/sc2001.htm>>.

counteraction requires a collective approach based on a platform of legitimacy that only the United Nations can provide. This will probably require further innovation. As Tom Farer suggested a year ago in the *American Journal of International Law*: "To treat the disease, we will have to have to invent a new scheme of international cooperation, one that, like weapons of mass destruction, has no historical parallel."¹

My comments to this are, first, that the experience of the past decade suggests that the Security Council can be innovative and, second, that a new regime would need to include both arms reduction and understandings regarding the use of military force.

The fundamental legal framework for such an ambitious enterprise is already embodied in Article 39 of the UN Charter, which authorizes the Security Council to determine the existence of a threat to the peace and to decide on the steps necessary for its removal. These may include the use of force as the last resort but nonmilitary means should be preferred.

It is obvious that such an enterprise is inherently difficult because of the intrinsically elusive nature of information on perceived threats. Perceptions and facts might be far apart in particular cases. The credibility of an action depends on the reliability of early knowledge of the actual facts and the extent of the threats: There are threats and there are threats—not all necessitate a military response.

Furthermore, to make any regime against proliferation of weapons of mass destruction effective, it will be important to address the specific security issues of the countries concerned as well as the regional context in which decisions leading to proliferation are made. Abstract norms will not suffice. Practical policies must be devised to find real solutions to real problems and to dispel imaginary ones. Law and policy must go hand in hand. Adequate policy responses and practical solutions are needed for the real security issues of the Korean Peninsula, South Asia, and the Middle East. Political problems require political solutions.

On the other hand, it is necessary to reach an *understanding* about identifiable threats to international peace, to make a *commitment* to collective action that will undercut such threats, and to ensure the *acceptance* of any military option the Security Council may need as a last resort. Admittedly, taken together, these requirements represent a tall order, but effective maintenance of international peace and security in the twenty-first century requires nothing less.

¹ Tom J. Farer, *Beyond the Charter Frame: Unilateralism or Condominium*, 96 AJIL 359, 364 (2002).